Supreme Court, U.S.
FILED

(1)

94 954 NOV 2 2 1994
NO.
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAMES H. WOODWARD — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

G. MURRAY TURNER
Counsel for Petitioner
MULHALL, TURNER, HOFFMAN
& COOMBS
440 S. Seventh Street
Suite 300
Louisville, Ky., 40203
(502) 584-6375

35 pp

QUESTION PRESENTED FOR REVIEW

Whether a state is prohibited from creating an unreasonable and arbitrary classification by changing a criminal law to the benefit of some defendants while denying it to others similarly situated, even if the deprived defendant's case is not yet final.

TABLE OF CONTENTS

ITEM

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Constitutional Provision Involved . 2

Statement of the Case 3

Reason for Granting Writ 10

The Commonwealth of Kentucky, acting through the Supreme Court of Kentucky, has created an artibtary and unreasonable distinction between the Petitioner and others similarly situated in violation of the Equal Protection Clause of the Fourteenth Amendment. This distinction involves the Petitioner's fundamental constitutional rights to liberty and fairness in the criminal justice system.

Conclusion 16

Appendix 19

A. Order Denying Discretionary Review Supreme Court of Kentucky 1a

B. Order Denying Motion to Cite Additional Authority 2a

C. Motion to Cite Additional Authority . 3a

D. Order Denying Petition for Rehearing, Kentucky Court of Appeals 4a

E. Opinion, Kentucky Court of Appeals, 10/1/93 . . . . . 5a

TABLE OF AUTHORITIES

Cooper v. Aaron, 358 U.S. 1 (1958) . 12

Dunn v. Blumstein, 405 U.S. 330 (1971) 12

Hill v. Texas, 316 U.S. 400 (1941) . 11

McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994) 8

Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (Ky. 1988) 7

Sizemore v. Commonwealth, 844 S.W.2d 397 (Ky. 1992) 7

Truax v. Corrigan, 257 U.S. 312 (1921) 11

NO.___

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1994

JAMES H. WOODWARD PETITIONER

versus

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, James H. Woodward, respectfully prays that a Writ of Certiorari be issued to review the opinion of the Kentucky Court of Appeals entered on October 1, 1993 and the Supreme Court of Kentucky's Order denying discretionary review on August 24, 1994.

OPINIONS BELOW

The Kentucky of Appeals issued an opinion on October 1, 1993, and denied a Petition for Rehearing on November 19, 1993. The Supreme Court of Kentucky denied discretionary review on August 24, 1994.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The Kentucky Court of Appeals opinion was rendered on October 1, 1993. The Supreme Court of Kentucky denied discretionary review on August 24, 1994.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of th Fourteenth Amendment, of the United States Constitution states in pertinent part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

STATEMENT OF THE CASE

On January 9, 1990, at approximately 5:00 p.m., the Petitioner entered Skip's Tavern in Louisville, Kentucky. The Petitioner testified he entered the tavern after receiving a call from his former girlfriend, Virginia O'Brien, in which she suggested meeting there. Ms. O'Brien later entered the tavern and exchanged some words with the Petitioner. Shortly thereafter, the Petitioner went to the men's restroom where he was threatened by a man that had been conversing with Ms. O'Brien. The Petitioner existed the restroom with a gun stuffed under his jacket. He walked over to Ms. O'Brien, said something to her, and then pulled out his gun. Petitioner then fired four shots in the bar. The shots were fired rapidly in a matter of seconds. One round struck Ms. O'Brien near

her ear, another round struck John Gathof, a bartender at Skip's. Two other rounds struck a juke box and a wall.

The Petitioner was subsequently indicted on two counts of First Degree Assault and two counts of First Degree Wanton Endangerment. He was ultimately re-indicted and was charged with Criminal Attempt to Commit Murder rather than First Degree Assault for the shooting of Ms. O'Brien. The two indictments were consolidated for trial.

At trial, the Petitioner testified as to being threatened and to his belief that he saw someone with a gun. The Petitioner believed physical force was about to be used upon him and the use of force was necessary to protect himself. Another patron in the bar that night testified he saw two people chasing the Petitioner. One of those individuals had a gun and at least one shot was fired.

Additionally, Mr. Gathof testified the Petitioner was expecting him to make a move and the Petitioner believed he had a gun.

At the close of the proof, the Petitioner requested on a self-protection instruction, but the trial court refused to give such an instruction and instructed the jury on Wanton Assault. The jury found the Petitioner guilty of Criminal Attempt to Commit First-Degree Manslaughter regarding the shooting of Ms. O'Brien, First Degree Wanton Assault for the shooting of Mr. Gathof and two counts of Second Degree Wanton Endangerment for firing two shots which missed two other patrons. The jury recommended a penalty of ten (10) years for the Attempt count, twelve (12) years for the Wanton Assault count, and twelve (12) months in jail and $500.00 in fines for each of the Wanton Endangerment convictions. Sentences were to run concurrently. In

January, 1992, the trial court followed the jury's recommendation and sentenced Petitioner to twelve (12) years in prison.

Petitioner subsequently appealed to the Kentucky Court of Appeals. In an opinion rendered on October 1, 1993, the Kentucky Court of Appeals affirmed the judgment of the trial court and rejected the Petitioner's contention that the trial court had erred in failing to give a self-protection instruction and in giving a First Degree Wanton Assault instruction. The Petitioner's Request for a Rehearing with the Kentucky Court of Appeals was denied on November 19, 1993. This Writ deals with this First Degree Assault conviction only.

Petitioner subsequently filed a Motion for Discretionary Review with the Supreme Court of Kentucky on December 8, 1993. In the Motion, the Petitioner alleged, inter alia,

the trial court should have instructed the jury on the intentional form of assault, the self-protection defense, and the lesser included wanton or reckless offense since there was evidence of a wanton or reckless culpable mental state and the assertion of a justification offense. The Petitioner based his Motion on a challenge to the interpretation of the Supreme Court of Kentucky's opinion in Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (Ky. 1988). Specifically, the Petitioner relied upon several dissenting opinions in Sizemore v. Commonwealth, 844 S.W.2d 397 (Ky. 1992). In Sizemore, the Justice who authored Shannon recognized the "confused state of affairs" created by that opinion. Sizemore, 844 S.W.2d at 407 (Leibson, J., dissenting). The Sizemore dissent further recognized that: "The intent in Shannon was to tell trial courts not to

instruct on wanton murder in cases like the present one. But the Shannon case has been misconstrued as advising the opposite -- to instruct on wanton murder, but omit self-defense." Id.

While the Petitioner's Motion for Discretionary Review was pending with the Supreme Court of Kentucky, that Court issued an opinion in McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994). In McGinnis, the Supreme Court of Kentucky recognized that the "unintended result of the Shannon opinion has been to create a class of cases wherein, because the accused claims self-defense, trial courts have been instructing on wanton murder while disregarding the fact that diminished culpability is a necessary corollary to 'wanton or reckless belief' in the need for self-defense." McGinnis, 875 S.W.2d at 518. However, "the purpose of Shannon was to

prevent giving an instruction on wanton murder . . . not to authorize giving such an instruction, and, even worse, to authorize giving one that invites conviction by omitting the accused's only line of defense." Id. at 522.

The Supreme Court of Kentucky then overruled Sizemore v. Commonwealth to the extent it had misinterpreted Shannon and held that a wanton offense is "no option in the self-defense scenario." Id. at 526. However, the Supreme Court of Kentucky concluded by stating: "This opinion is an interpretation of substantive law, and as such it is only prospective application. It applies only to those cases not final where the issue is preserved." Id. at 529.

Despite the fact the Petitioner's case was still pending and not final under Kentucky law, the Kentucky Supreme Court subsequently

denied Petitioner's Motion to cite McGinnis as additional authority and his Motion for Discretionary Review. The Supreme Court of Kentucky did not remand the Petitioner's case back to the trial court for the purposes of granting him a new trial based on McGinnis.

REASON FOR GRANTING WRIT

The Commonwealth of Kentucky, acting through the Supreme Court of Kentucky, has created an arbitrary and unreasonable distinction between the Petitioner and others similarly situated in violation of the Equal Protection Clause of the Fourteenth Amendment. This distinction involves the Petitioner's fundamental constitutional rights to liberty and fairness in the criminal justice system.

Under the Equal Protection Clause, no person may be denied the same protection of the laws enjoyed by other persons in like circumstances, in their lives, liberty,

property and pursuit of happiness. See Truax v. Corrigan, 257 U.S. 312 (1921). Stated somewhat differently, the rights of all persons must rest upon the same rule under the same circumstances. 16A AmJur2d Constitutional Law §737 (1979). Thus, the Equal Protection Clause is based upon the fundamental principal that all persons similarly situated must be treated alike.

The Equal Protection Clause is more than an abstract right. It is a clause which states must respect, and every person may demand its benefits. See Hill v. Texas, 316 U.S. 400 (1941).

The Equal Protection Clause is far reaching and covers all the instrumentalities by which the state acts and extends to all actions of the state which deny equal protection of the laws. Thus, the Equal Protection Clause applies to actions taken by

the state by the judiciary. See Cooper v. Aaron, 358 U.S. 1 (1958). Judgment may not be rendered in violation of the Constitutional guarantee of equal protection under the law.

Additionally, the Equal Protection Clause bars the state from arbitrarily enforcing its laws. Any distinction between similarly situated persons must be rational and reasonable. The reason for the state's classification must be inherent, natural and substantial. 16 AmJur2d Constitutional Law §754 (1979).

If the state's classification involves a fundamental right, then the classification is subject to strict judicial scrutiny. Thus, governmental action affecting fundamental constitutional rights must be necessary to achieve a compelling governmental interest and must be narrowly tailored to serve a legitimate state objective. Dunn v.

Blumstein, 405 U.S. 330 (1971).

In this case, the Petitioner's fundamental right to liberty is adversely affected by the decisions of the Supreme Court of Kentucky. The Petitioner's constitutional right to liberty is considered a fundamental right for the purposes of equal protection analysis. See John E. Nowak and Ronald D. Rotunda, Constitutional Law §14.39 (4th ed. 1991).

Moreover, fairness in the criminal justice system is a fundamental right of every person. Nowak and Rotunda, Constitutional Law §14.41 (4th ed. 1991). "When the Government takes actions that burden the rights of a classification of persons in terms of their treatment in the criminal justice system it is proper to review these laws under the strict scrutiny standard for equal protection." Id.

The decision of the Kentucky Supreme

Court to deny the Petitioner's Motion for Discretionary Review and to leave him without adequate remedy, despite the fact his case was still pending at the time the opinion in McGinnis v. Commonwealth was rendered is unconstitutional. When the McGinnis opinion was rendered, the Petitioner's Motion for Discretionary Review was still pending. The Petitioner's judgment was not final under Kentucky law. Thus, the Petitioner was entitled to the relief outlined in McGinnis.

Even the Supreme Court of Kentucky recognized its opinion in McGinnis applied to cases that were not final if the issue was preserved. Nevertheless, the Supreme Court of Kentucky denied the Petitioner's Motion for a Discretionary Review. This Motion to cite McGinnis as authority created an arbitrary and unreasonable distinction between the Petitioner and the defendants in McGinnis in

violation of the constitutional mandate of equal protection under the law.

The Supreme Court of Kentucky's decision is clearly arbitrary and unreasonable. The decision to deny the Petitioner the benefit of the McGinnis opinion was not necessary to achieve any compelling governmental interests. In fact, there is no governmental interests in denying prospective application of the law to those cases not yet finalized at the time the McGinnis opinion was rendered, such as the Petitioner's.

It is ironic that the Petitioner would have reached the Supreme Court of Kentucky before the defendants in McGinnis but for a quirk in Kentucky's appellate procedure. Because the Defendants in McGinnis were both sentenced to more than twenty (20) years imprisonment, they were entitled to directly appeal their convictions to the Supreme Court

of Kentucky. In contrast, the Petitioner received a twelve (12) year sentence of imprisonment and he was not allowed to directly appeal to the Supreme Court of Kentucky. Instead, the Petitioner was required to take his immediate appeal to Kentucky Court of Appeals.

The Petitioner should not be denied the benefit of the McGinnis opinion merely because he was unable to directly appeal to the Supreme Court of Kentucky.

CONCLUSION

This Writ provides the Court with an opportunity to provide the Petitioner with equal protection under the law. The Court can prevent the Commonwealth of Kentucky from arbitrarily distinguishing between the Petitioner and the defendants in McGinnis. Since the Petitioner's judgment of conviction was not final at the time the McGinnis opinion

was rendered, he is entitled to the benefit of the law as expressed in that opinion. The Commonwealth of Kentucky denied the Petitioner equal protection under the law when the Supreme Court of Kentucky denied the Petitioner's Motion for Discretionary Review. If the Supreme Court of Kentucky wanted to deny the Petitioner's Motion for Discretionary Review, it should have at least remanded his case to the trial court with instructions to grant a new trial consistent with the opinion in McGinnis.

A Writ of Certiorari should be granted to ensure that the Petitioner's constitutional right to equal protection under the laws as expressed in the Fourteenth Amendment is properly protected.

Respectfully submitted,

G. MURRAY TURNER
Counsel for Petitioner
MULHALL, TURNER, HOFFMAN
& COOMBS
440 S. Seventh Street
Suite 300
Louisville, Kentucky 40203
(502) 584-6375

APPENDIX

SUPREME COURT OF KENTUCKY

93-SC-983-D
(92-CA-397)

JAMES H. WOODWARD — MOVANT

v. JEFFERSON CIRCUIT COURT
NO. 90-CR-122

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

This motion for review of the decision of the Court of Appeals is denied.

ENTERED August 24, 1994.

_____
Chief Justice

SUPREME COURT OF KENTUCKY

93-SC-983-D

JAMES H. WOODWARD MOVANT

ON REVIEW FROM COURT OF APPEALS
v. 92-CA-397
JEFFERSON CIRCUIT COURT NO. 90-CR-122

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER

Movant's motion for leave to cite additional authority in support of his motion for discretionary review is denied.

ENTERED August 4, 1994.

ROBERT F. STEPHENS
Chief Justice

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 93-SC-00983

(COURT OF APPEALS NO. 92-CA-397-MR)
(ON APPEAL FROM JEFFERSON CIRCUIT COURT)
(HON. WILLIAM L. KNOPF, JUDGE)
(ACTION NOS. 90-CR-1564 & 90-CR-0122)

JAMES H. WOODWARD — MOVANT

vs.

MOTION TO CITE ADDITIONAL AUTHORITY IN SUPPORT OF MOTION FOR DISCRETIONAL REVIEW

COMMONWEALTH OF KENTUCKY — RESPONDENT

*** *** *** ***

Comes the Movant, James H. Woodward, by counsel, and moves the Court to enter an Order permitting the Movant to cite additional authority in support of his Motion for Discretionary Review. In support of said motion, the Movant states as follows:

1. The additional authority the Movant seeks to cite, McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994) is pertinent to the instruction argument set forth on Page 7-9 of

the Movant's Motion. This supplemental citation addresses the issue presented and appears dispositive of said issue. The decision was not final and thus available for citing at the filing of this Motion for Discretionary Review.

WHEREFORE, Movant prays that his Motion herein be SUSTAINED.

Respectfully submitted,

G. MURRAY TURNER
Counsel for Defendant
MULHALL, TURNER, HOFFMAN & COOMBS
440 South Seventh Street, Suite 300
Louisville, Kentucky 40203
Phone: (502) 584-6375

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed this 29th day of July, 1994, to the Hon. David E. Spenard, Assistant Attorney General, Criminal Appellate Division, Capitol Building, Frankfort, Kentucky 40601-3494.

G. MURRAY TURNER

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

No. 92-CA-0397-MR

JAMES HARVEY WOODWARD — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE WILLIAM KNOPF, JUDGE
ACTION NO. 90-CR-122

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

* * * * * * *

BEFORE: GARDNER, HOWERTON and McDONALD, Judges.

The Court having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: November 19, 1993

MICHAEL McDONALD
JUDGE, COURT OF APPEALS

RENDERED: OCTOBER 1, 1993; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 92-CA-000397-MR

JAMES HARVEY WOODWARD APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM KNOPF, JUDGE
ACTION NO. 90-CR-122

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

*** *** *** ***

BEFORE: GARDNER, HOWERTON, and McDONALD, Judges

GARDNER, JUDGE: Appellant, James Harvey Woodward (Woodward) appeals from his conviction in Jefferson Circuit Court for criminal attempt to commit first degree manslaughter, wanton assault in the first degree and two counts of second degree wanton

endangerment. After carefully reviewing the record, we can find no reversible error.

Woodward's indictment and subsequent conviction stemmed from events that occurred on January 9, 1990 at Skip's Tavern in Louisville, Kentucky. Woodward entered the tavern on that day, apparently wishing to see his former girlfriend, Virginia O'Brien (O'Brien). O'Brien later entered the tavern and exchanged some words with Woodward. Following this Woodward went into the men's restroom where he alleges he was threatened by a man that had been conversing with O'Brien. Woodward exited the restroom with a gun stuffed under his jacket. He walked over to O'Brien and said something to her and then pulled out his gun and shot it at her, striking her near her ear. He then fired another shot toward the bar which struck and severely injured Jack Gathof, a bartender at

Skip's. Woodward then fired two more shots which narrowly missed two other patrons of the tavern. Woodward then fled from the tavern and was arrested a couple of days later.

Woodward was subsequently indicted for two counts of assault in the first degree and two counts of wanton endangerment in the first degree. Woodward was ultimately reindicted and was charged with criminal attempt to commit murder rather than assault in the first degree for his shooting of O'Brien. The other three charges were identical to those int he first indictment. The two indictments were consolidated.

Trial was held in December 1991. Woodward was found guilty of criminal attempt to commit first-degree manslaughter regarding his shooting of O'Brien, wanton assault in the first degree for his shooting of Gathof, and two counts of second degree wanton

endangerment for firing the two shots which narrowly missed Roberta Creamer and Ivan Cundiff. The jury recommended a penalty of ten years for the attempt count, twelve years for the wanton assault count, and twelve months in jail and $500 fines for each of the wanton endangerment convictions. The sentences were to run concurrently.

The circuit court in January 1992 followed the jury's recommendation and sentenced Woodward to twelve years imprisonment. The judgment was entered January 31, 1992. Woodward has appealed to this court.

Woodward first contends that this Court should reverse the circuit court's judgment, because the jury was permitted to improperly consider a document not introduced as evidence in the course of its deliberations. This Court cannot find that reversible error

occurred on this issue.[1]

The objectionable document was four pages of a statement Mr. John McCubbins gave to police on the day of the shooting. McCubbins, a witness at the trial, was the daytime bartender at Skip's and was standing behind the bar when Woodward began shooting. In the statement given to the jury, he told police about how the shootings occurred and what he observed. The four pages of McCubbins' statement were apparently accidentally attached to the back of an exhibit presented to the jury. Woodward moved for a new trial as a result of the statement being given to

1 Woodward in this argument and throughout his brief has failed to comply with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(iv) which states that an appellant's brief shall contain an argument with ample supportive references to the record and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner. CR 76.12(4)(c)(iv) is made applicable to criminal cases through Kentucky Rule of Criminal Procedure (RCr) 12.02 and RCr 13.04. We could simply refuse to consider Woodward's arguments, Elwell v. Stone, Ky.App., 799 S.W.2d 46 (1990); Pierson v. Coffey, Ky.App., 706 S.W.2d 409 (1985), however due to the importance of the arguments and the fact that the Commonwealth has raised no objection, we will consider the arguments.

the jury, but the circuit court denied this motion.

In general RCr 9.24 provides,

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect int he proceeding that does not affect the substantial rights of the parties.

Error without prejudice should be disregarded. Commonwealth v. Conovan, Ky., 619 S.W.2d 601 (1980). See Cole v. Commonwealth, Ky., 553 S.W.2d 468 (1977); Cosby v. Commonwealth, Ky. 451 S.W.2d 653 (1970); Smith v. Commonwealth, Ky., 375 S.W.2d 242 (1963). A trial court's decision not to grant a mistrial or a new trial will not be disturbed absent an abuse of

discretion. Jones v. Commonwealth, Ky.APp., 662 S.W.2d 483, 484 (1983).

The four pages of McCubbins statement were accidentally presented to the jury in the instant case; neither party nor the trial court knows how they became attached to the back of another exhibit. The record reveals that McCubbins was a live witness at the trial and his detailed testimony was already before the jury. There is nothing in the pages of his statement to police that was not contained in his testimony before the jury. While technically his statement to police should not have been given to the jury, we can find nothing prejudicial about the statement. The facts of the instant case differ markedly from Smith v Commonwealth, Ky., 645 S.W.2d 707 (1983); Reed v. Commonwealth, Ky., 579 S.W.2d 109 (1979); Farese v. United States, 428 F.2d 178 (5th Cir. 1970), and other cases cited by

Woodward. In those cases, the juries were given highly prejudicial items such as weapons, and shirts stuffed with money, and allowed to experiment with the objects. We simply do not believe that any prejudicial error occurred in the case at bar.

Woodward next argues that the circuit court erred in instructing the jury on wanton assault, and this instruction led to an inconsistent verdict. He specifically maintains that since the shots were fired simultaneously, the evidence did not support an instruction for wanton assault. He contends that his actions were either intentional or wanton but not both, and that the verdicts were thus inconsistent. We disagree.

Generally, it is a court's duty to instruct the jury on the whole law of the case. Barbour v. Commonwealth, Ky., 824

S.W.2d 861, 863 (1992). The jury should be instructed on every state of the case deducible from and supported by the evidence presented. Id. The instructions must follow the evidence presented, and no theory of the case unsupported by the evidence is entitled to an instruction. Id.

In the instant case, the jury was instructed on criminal attempt to commit murder and criminal attempt to commit first degree manslaughter regarding O'Brien's injury, and for both intentional and wanton first degree assault relating to Gathof's shooting. Under KRS 506.010(1),

> A person is guilty of criminal attempt to commit a crime when acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally does or omits

> to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in the commission of the crime."

KRS 507.030(1) defines manslaughter in the first degree, and it is clearly an intentional crime. KRS 508.010(1) defines assault in the first degree. It provides, that a person is guilty of this crime when,

> (a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument, or
> (b) Under circumstances manifesting an extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of serious physical injury to another person."

Finally, KRS 501.020(1) states, "[a] person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause that result or to engage in that conduct[,]" while according to KRS 501.020(3),

"[a] person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." See also Lambert v. Commonwealth, Ky., 377 S.W.2d 76 (1964).

The evidence presented in the instant case supported the circuit court's jury instructions on both wanton and intentional crimes. There is evidence from which a jury could conclude that Woodward acted intentionally toward O'Brien, but then turned and fired at Gathof wantonly as he was aware of the risk of seriously injuring Gathof or someone else but consciously disregarded the risk. Thus, there was evidence to support both an intentional and wanton instruction pursuant to KRS 508.010. It has within the

jury's prerogative as a factfinder to consider the evidence and the court's instructions and reach its decision.

Woodward as part of his second argument hints that there was an amendment of his indictment as he was indicted for intentional assault in the first degree but evidence was presented regarding a wanton theory of first degree assault and the jury was so instructed. We find no error.

An amendment of the indictment arises when the charging terms of an indictment are altered, either literally or in effect, after the grand jury has passed upon them. United States v. Beeler, 587 F.2d 340 (6th Cir. 1978). See Martin v. Kassulke, 970 F.2d 1539 (6th Cir. 1992). A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those

alleged in the indictment. Martin v. Kassulke, 970 F.2d at 1542; United States v. Beeler, 587 F.2d at 342. A constructive amendment occurs when the terms of an indictment are effectively altered by the presentation of evidence and the jury instructions so that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment. Id. A variance is usually subject to the harmless error rule while an amendment or constructive amendment is often considered prejudicial per se. Id.

In the instant case, Woodward was indicted for first degree assault by intentionally causing serious physical injury to Gathof by means of a handgun. At trial, the evidence revealed that Woodward may not have intentionally shot to Gathof, but heard someone yell and then shot in that direction.

At any rate, both the intentional and wanton theories of first degree assault are contained in KRS 508.010, so Woodward was not convicted of an offense other than that charged in the indictment. Thus, at most there was only a nonprejudicial variance.

Thirdly, Woodward argues that the circuit court erred in not requiring certain federal agents to testify on his behalf and also in not instructing the jury regarding self-protection. Both parts of Woodward's argument lack merit.

The circuit court did not err in requiring two federal witnesses to testify. Woodward contends that these two federal agents could have shown that sales of illegal firearms were conducted in Skip's Tavern until the day of the shootings in question. The record reflects that one witness who worked as an undercover agent in Skip's Tavern from

October 1989 through December 1989 for the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury Department did testify. She testified regarding drug trafficking, gun running and gambling occurring in the tavern during the time she worked there. She also testified about the behavior of O'Brien in the tavern during that time. Woodward has not shown that the other two federal agents would have provided any different or more relevant testimony regarding the events of January 9, 1990. The record reflects that these other people were part of an important ongoing investigation and that their testimony would have been merely duplicative. Further, Woodward has not cited to any authorities to support his position that this Court should reverse the circuit court for its decision not to require these agents to testify.

This Court also will not reverse the

trial court because a self-protection instruction was not given to the jury. First, Woodward has not shown where this issue was properly preserved. The tender of instructions standing alone is insufficient to preserve an error. Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987). A party must state specifically the matter to which he objects and the grounds for his objection. Id. See RCr 9.54. It is not clear whether this occurred in the instant case.

The record also reflects that Woodward was not entitled to a self protection instruction. Whether sufficient evidence exists at trial to entitle a defendant to an instruction is a question of law to be decided by the trial court and ultimately by an appellate court. Commonwealth v. collins, Ky., 821 S.W.2d 488, 491 (1991). The trial court should give instructions applicable to

every state of the case covered by the indictment and deducible from the evidence. Id.; Reed v. Commonwealth, 738 S>W.2d at 822. The determination of what issues to submit to the jury should be made based upon the totality of the evidence. Id. There must be some evidence to support the instruction. Commonwealth v. Colins, 821 S.W.2d at 491. There was virtually no evidence presented in the case at bar to show that Woodward acted in self-protection. He testified that after he started shooting, someone may have had a gun or a cue stick. When he started shooting he clearly had not been threatened with a weapon. Further, the self-protection argument seems to contradict Woodward's theory that he acted because of extreme emotional disturbance and cannot remember firing any of the shots.

Woodward next contends that his conviction and sentence were secured as

results of prosecutorial misconduct. He alleges three specific grounds of prosecutorial misconduct: the Commonwealth's failure to inform the defense that Woodward had made an incriminating statement, the Commonwealth's alleged prejudicial references to Woodward's alleged abuse of O'Brien, and the Commonwealth's alleged intentional misleading of the jury regarding Woodward's parole eligibility. All of these allegations lack merit.

We will first address Woodward's argument that the Commonwealth apparently intentionally did not inform the defense of an incriminating statement. Once again, Woodward has not clearly cited in his argument to the portions of testimony to which he is objecting. From his general allegations and from our review of the record, it appears that he is referring to testimony from John McCubbins. McCubbins

testified that he heard Woodward tell O'Brien before the shooting that she should say her prayers, because she was going to die. The defense counsel moved for a mistrial at that point in the testimony on grounds that the defense had not been made aware of the statement. The trial court correctly denied this motion. First, the record reveals that this statement by the witness was spontaneous as he earlier had not informed authorities about this statement. There was no showing that the Commonwealth had known about this statement. Further, there was no showing of prejudice. This statement was not crucially incriminating and the defense counsel was able to extensively impeach McCubbins regarding why he had not earlier remembered this statement. Woodward cites no controlling authorities to support his position.

Woodward's argument that the Commonwealth

pursued improper questioning and comment regarding Woodward's alleged abuse of O'Brien must also fail. The record reveals that the defense pursued a line of questioning regarding possible abuse of O'Brien to show that the police were unable to determine that Woodward had inflicted abuse. We have reviewed the cross-examination of the police by the Commonwealth and the questioning of O'Brien concerning the abuse relationship she had with Woodward. We are unable to find improper comments or questioning by the Commonwealth. Further, we have reviewed the Commonwealth's closing argument during the penalty phase and cannot find where the Commonwealth made any remarks about spousal abuse. The remarks about the community's views were not per se impermissible nor prejudicial, see United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991), and do not

remotely resemble the prejudicial remarks in Taulbee v. Commonwealth, Ky., 438 S.W.2d 777 (1969), Goff v. Commonwealth, 214 Ky. 428, 44 S.W.2d 306 (1931), and other cases cited by Woodward. Further, we found no objections by the defense during the closing argument. Thus, even if error existed, it was not properly preserved. See Cutrer v. Commonwealth, Ky.App., 697 S.W.2d 156 (1985).

There was also no misconduct or error regarding questioning about parole eligibility. The record clearly shows that the defense counsel called Katie Malone, the Probation and Parole officer, and initiated the line of questioning about when Woodward could be paroled and whether he could be paroled early. After reviewing the portions of testimony and closing argument cited to by Woodward, we can find no misconduct by the Commonwealth. There has been no misstatement

of the law regarding parole as occurred in Ruppee v. Commonwealth, Ky., 754 S.W.2d 852 (1988).

Woodward finally argues that the procedure used in the penalty phase of this trial violated both the United States and Kentucky Constitutions. He contends that since the commonwealth elected not to put on any proof, he was prevented from putting on important evidence. The record refutes his contention.

KRS 532.055 governs the penalty/sentencing phase of criminal trials. The statute clearly outlines the evidence that may be introduced during the penalty phase. The Commonwealth may offer evidence regarding minimum parole eligibility, prior convictions of the defendant, the nature of prior offenses, dates of commission, sentencing and release from confinement of prior offenses,

the maximum expiration of sentences, and the defendant's status if on probation, parole, conditional discharge or other form of legal release. The Kentucky Supreme court has ruled that the defendant must also be given the opportunity to introduce evidence regarding minimum parole eligibility. Williams v. Commonwealth, Ky., 810 S.W.2d 511 (1991); Boone v. Commonwealth, Ky., 780 S.W.2d 615 (1989). The statute allows the defendant to introduce evidence in mitigation, and defines mitigating evidence as evidence that the accused has no significant history of criminal activity which may qualify him for leniency. The statute also allows the defendant to introduce evidence which negates any evidence introduced by the Commonwealth.

Woodward was presented an opportunity during the penalty phase to call witnesses and to testify himself regarding the evidentiary

items set out in KRS 532.055. The circuit court correctly prohibited Woodward from calling witnesses who would testify about his health, character and other matters not permitted by statute. Further, if Woodward believed that the circuit court was excluding permissible testimony, he should have taken the testimony by avowal to properly preserve it for judicial review. See Queen v. Commonwealth, Ky., 551 S.W.2d 239 (1977).

For the foregoing reasons, the Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT

G. Murray Turner
Louisville, Kentucky

ATTORNEY FOR APPELLEE

Chris Gorman
Attorney General

J. Gerald Henry
Assistant Attorney General
Frankfort, Kentucky